FILED

94 196 AUG - 2 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,

Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF COUNSEL:

DONALD F. PIERCE
H. WILLIAM WASDEN
PIERCE, CARR & ALFORD, P.C.
Suite 900
1110 Montlimar Drive
Mobile, Alabama 36609
(205) 344-5151

* THEODORE B. OLSON
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
* *Counsel of Record*

QUESTION PRESENTED

Whether the right to an impartial tribunal, guaranteed by the Due Process Clause of the Fourteenth Amendment, is violated when a state trial judge continues to preside over a case after receiving substantial payments during the pendency of the case from counsel for a party to the case.

PARTIES INVOLVED

In addition to the parties listed in the caption, Cowin Equipment Company is a party to the underlying case pending in the trial court. Petitioner is Grove North America, Division of Kidde Industries, Inc., and its parent corporation is Hanson, P.L.C. Petitioner has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES INVOLVED ii

ORDER BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. Facts Material To The Question Presented 2

B. How The Federal Question Was Raised 4

C. The Decision Below Is Final 6

REASONS FOR GRANTING THE WRIT 8

A. The Supreme Court Of Alabama's Rejection Of Grove's Due Process Claim Conflicts With Applicable Decisions Of This Court 8

B. The Supreme Court Of Alabama's Rejection Of Grove's Due Process Claim Conflicts With The Decisions Of Other Federal And State Appellate Courts 11

C. The Petition Presents An Important Federal Question That Should Be Resolved By This Court 16

CONCLUSION 17

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 3a

APPENDIX D 4a

APPENDIX E 6a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Aetna Life Ins. v. Lavoie, 475 U.S. 813 (1986) 6,9,10,13

Aetna Life Ins. Co. v. Lavoie, 470 So.2d 1060 (Ala. 1984), *vacated*, 475 U.S. 813 (1986) 6

Balogun, Ex parte, 516 So.2d 606 (Ala. 1987) 7

Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214 (N.J. 1981) 13

Beard, In re, 811 F.2d 818 (4th Cir. 1987) 14

Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 5

Breakstone v. MacKenzie, 561 So.2d 1164 (Fla. App. 1989), *quashed in pertinent part*, 565 So.2d 1332 (Fla.), *and vacated in pertinent part*, 571 So.2d 32 (Fla. App. 1990) 16

Brown v. Brown, 397 S.E.2d 545 (Va. App. 1990) 15

Caleffe v. Vitale, 488 So.2d 627 (Fla. App. 1986) 11

Central States Health & Life Co. of Omaha, Ex parte, 594 So.2d 80 (Ala. 1992) 7

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) ..... *passim*

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Drexel Burnham Lambert Inc., In re, 869 F.2d 116 (2d Cir.), *cert. denied*, 490 U.S. 1102 (1989) 14

Fein v. Fein, 610 N.Y.S.2d 1002 (Sup. Ct. 1994) 13

Fiftieth Dist. Court Judge, In re, 483 N.W.2d 676 (Mich. App. 1992) 11,12

Illinois v. Gates, 462 U.S. 213 (1983) 6

Table of Authorities (Continued)

Page(s)

James D. Morrisey, Inc. v. Gross Construction Co., 443 A.2d 344 (Pa. Super. 1982) 13

Johnston v. Security Ins. Co. of Hartford, 6 Cal. App. 3d 839, 86 Cal. Rptr. 133 (1970) 11,14

Kiker, Ex parte, 612 So.2d 453 (Ala. 1993) 7

Lawrence, Matter of, 335 N.W.2d 456 (Mich. 1983) ... 14

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 9

MacKenzie v. Super Kids Bargain Store, 565 So.2d 1332 (Fla. 1990) 15

Mason, In re, 916 F.2d 384 (7th Cir. 1990) 15

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 8

Melof, Ex parte, 553 So.2d 554 (Ala. 1989) 7

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 8

Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) 14

Murchison, In re, 349 U.S. 133 (1955) 4,5,8,9

NAACP v. Alabama, 150 So.2d 677 (Ala. 1963), *rev'd on other grounds*, 377 U.S. 288 (1964) 7

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 5

Offutt v. United States, 348 U.S. 11 (1954) ... 4,5,9,13,15

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) 11,12,13

Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994) 14

Table of Authorities (Continued)

Page(s)

Taylor v. Kentucky, 436 U.S. 478 (1978) 5

Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987), *cert. dismissed*, 485 U.S. 994 (1988) 15

Tumey v. Ohio, 273 U.S. 510 (1927) 9,10

United States v. Couch, 896 F.2d 78 (5th Cir. 1990)... 14

United States v. Williams, 112 S. Ct. 1735 (1992) 6

Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 9

White, Ex parte, 300 So.2d 420 (Ala. App.), *cert. denied*, 300 So.2d 439 (Ala. 1974)..... 5

Table of Authorities (Continued)

Page(s)

Constitution, Statutes and Rules

Due Process Clause, U.S. Const., amend. XIV, § 1 2,4,9

9 U.S.C. § 10(b) 10

28 U.S.C. § 455(a) 13

28 U.S.C. § 1257 8

28 U.S.C. § 1257(a) 2,6

Ala. Code § 17-22A-8 16

Ariz. Rev. Stat. Ann. § 16-913(E) 16

Fla. Stat. § 105.08(1) 16

Ind. Code § 33-5-5.1-29.5 16

Md. Elec. Code §§ 1-1(a)(4), 26-9 16

Nev. Rev. Stat. § 294A.110 16

N.Y. Code of Prof'l Resp., DR 7-110, 22 N.Y. C.R.R. § 1200.41 16

S.D. Stat., tit. 16, ch. 16-2, App., Canon 5C(2) 15

Sup. Ct. R. 10.1(b) 14

Sup. Ct. R. 10.1(c) 11,17

Other Authorities

Alabama Judicial System: 1993 Annual Report 4

R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* (7th ed. 1993) 8

Mobile Register, July 17, 1994 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No.

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,
Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Grove North America, Division of Kidde Industries, Inc., a corporation ("Grove"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

ORDER BELOW

The order of the Supreme Court of Alabama denying Grove's petition for a writ of mandamus seeking disqualification of the state trial judge (App., *infra*, 1a) is not reported.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on March 22, 1994. Grove's motion for rehearing was

denied on April 18, 1994. App., *infra*, 3a. On July 11, 1994, Justice Kennedy signed an order extending the time for filing a petition for a writ of certiorari to and including August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts Material To The Question Presented

This petition arises out of a products liability action brought on May 1, 1991, by respondent Richard Douglas Lowe ("Lowe") against Grove and Cowin Equipment Company ("Cowin") in the Circuit Court of Jefferson County, Alabama. Lowe alleges that he sustained injuries as a result of a defect in a crane manufactured by Grove and sold by Cowin. Lowe is represented in this case by the law firm of Hare, Wynn, Newell & Newton ("Hare, Wynn"). The case is set for trial on November 14, 1994.

This case was assigned to Judge Roger Monroe of the Jefferson County Circuit Court. During 1990, while a private practitioner, Judge Monroe had referred a number of his civil clients to the Hare, Wynn firm. Thereafter, he campaigned for and was elected to the Jefferson County Circuit Court. Hare, Wynn was Judge Monroe's second largest contributor in that campaign, contributing a total of $8,000 (App., *infra*, 6a), more than ten percent of the judge's total contributions.

On March 1, 1991, shortly before the commencement of this case, Hare, Wynn paid Judge Monroe $2,136 as a "referral fee" for a case that Judge Monroe had referred to the firm

before being elected to the bench. App., *infra*, 4a, 6a. Grove is informed and believes that the client in that case, Lisa Lewis, served as Judge Monroe's campaign manager and treasurer when he ran for his position as Circuit Judge, and that Ms. Lewis also currently serves as Judge Monroe's office assistant.

On June 4, 1992, while this case was pending before Judge Monroe, the Hare, Wynn firm paid Judge Monroe an additional $23,937.33. App., *infra*, 4a, 6a. That amount constituted the "referral fees" resulting from the resolution of the claims of two other clients that had previously been referred to the firm by the judge while he was still in private practice. *Id.* at 4a, 6a. Thereafter, in 1993, Hare, Wynn contributed $5,000 to Judge Monroe to support his campaign (which is still ongoing) for election to the Alabama Court of Civil Appeals.

Neither Judge Monroe nor Hare, Wynn disclosed to Grove that they had a substantial financial relationship during the pendency of this case. In particular, neither Judge Monroe nor the firm informed Grove that Hare, Wynn was obligated to Judge Monroe for referral fees during the pendency of this case or that the firm made large payments to the judge both shortly before filing suit and also while the case was pending before the judge.

In September 1993 Grove learned of one of these payments to Judge Monroe. Accordingly, on October 7, 1993, Grove filed a motion to recuse Judge Monroe from presiding over this case. After obtaining discovery from the Hare, Wynn firm about the extent of the financial relationship between the firm and Judge Monroe, Grove filed an amended motion on December 6, 1993, setting forth the facts discussed above.

On December 10, 1993, Judge Monroe denied Grove's motion and amended motion for recusal from the bench; no

written opinion was issued.[1] Grove then filed a petition for writ of mandamus in the Supreme Court of Alabama, asking that court to direct Judge Monroe to disqualify himself from further participation in this case. The Supreme Court of Alabama denied the petition without opinion on March 22, 1994. App., *infra*, 1a. As noted above, this case is presently scheduled to go to trial before Judge Monroe on November 14, 1994.

B. How The Federal Question Was Raised

In its motion to recuse Judge Monroe, Grove specifically relied on federal due process principles and cases applying those principles. For example, Grove quoted *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)), for the proposition that, under the circumstances of this case, "disqualification is rightly required so that 'justice [will] satisfy the appearance of justice.'" Defendant Grove North America's Memorandum Brief In Support Of Motion For Recusal ("Trial Ct. Br.") at 3. *In re Murchison* and *Offutt v. United States*, of course, set forth the standard for disqualification of judges under the Due Process Clause (*see Murchison*, 349 U.S. at 136; *Offutt*, 348 U.S. at 14-15), and Grove's quotation of the rule laid down in those cases therefore constitutes express reliance on the Due Process Clause.

Similarly, Grove's recusal motion relied on this Court's due process analysis in *Murchison*, 349 U.S. at 136, for the proposition that "[t]he reasonable person/appearance of impropriety test . . . may '[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *See* Trial Ct. Br. at 2. These explicit references to due process cases and doctrines plainly "sufficed to alert

[1] More than 20 judges sit on the Jefferson County Circuit Court. *See Alabama Judicial System: 1993 Annual Report* 80. As a result, there would have been no difficulty in reassigning the case to a different judge if Judge Monroe had granted Grove's recusal motion.

the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978); *see also Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment*, 347 U.S. 590, 599 (1954); *cf. New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 69 (1928) (finding federal claim properly preserved where state court cited Fourteenth Amendment cases from this Court in rejecting challenge to a state statute).

By the same token, Grove properly raised its due process claim in the Supreme Court of Alabama. Indeed, Grove's petition for mandamus contains the same quotations from *Murchison* and *Offutt* as those set forth above and relies to the same extent on the due process analysis of those cases. *See* Petitioner Grove North America's Memorandum Brief In Support Of Petition For Mandamus ("Sup. Ct. Br.") at 3 (quoting *Murchison*, 349 U.S. at 136, for the proposition that "[t]he reasonable person/appearance of impropriety test . . . may '[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties'"); Sup. Ct. Br. at 5 (quoting *Murchison*, 349 U.S. at 136, and *Offutt*, 348 U.S. at 14, for the proposition that "disqualification is rightly required so that 'justice [will] satisfy the appearance of justice'").

Moreover, Grove's mandamus petition also relied on *Ex parte White*, 300 So.2d 400, 429 (Ala. App.), *cert. denied*, 300 So.2d 439 (Ala. 1974), for the proposition that "'[i]mplanted in the foundation of public policy is the general rule that no judge shall preside in a case in which he is not wholly free, disinterested, and independent.'" Sup. Ct. Br. at 5. The only case cited by *Ex parte White* for that proposition is another one of this Court's due process cases, *Tumey v. Ohio*, 273 U.S. 510 (1927). *See White*, 300 So.2d at 429. In addition, *White* contains an extensive discussion of the due process requirement of a fair tribunal. *Id.* at 429 (citing *Murchison*, *Offutt*, and *Tumey*, and noting that "[t]his rule is basic in the Constitution of our United States"). Thus, Grove clearly

and unquestionably raised its due process claim in the Alabama Supreme Court.[2]

The courts below did not expressly address Grove's due process claim.[3] This Court has made clear, however, that it will review federal questions that were "*either* raised or squarely considered" in a state court. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (emphasis added); *see United States v. Williams*, 112 S. Ct. 1735, 1738-39 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' . . . . [T]his rule operates (as it is phrased) in the disjunctive"). Accordingly, because Grove's due process claim was "pressed" in the courts below, it is properly before this Court.

C. The Decision Below Is Final

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In this case, the Supreme Court of Alabama's denial of Grove's petition for a writ of mandamus constitutes a final judgment or decree for purposes of Section 1257(a).

To be sure, the underlying products liability action giving rise to this petition is still pending in the state trial court. That fact does not, however, affect the finality of the decision

---

[2] Grove also raised this issue in its motion for rehearing in the Alabama Supreme Court, arguing that "Judge Monroe's participation in this case violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment." Motion For Rehearing at 3.

[3] The Supreme Court of Alabama's failure to explain the basis for its rejection of Grove's due process claim is reminiscent of that court's similar unwillingness to review the merits of Justice Embry's failure to recuse himself in *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1984), *vacated*, 475 U.S. 813 (1986). *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 818 (1986) (noting that "each justice [of the Supreme Court of Alabama] . . . voted individually on the matter of whether he should recuse himself").

below. To the contrary, this Court's precedents make clear that this case is final for two independently sufficient reasons.

1. In the first place, the decision below is final because Alabama procedure does not afford Grove any further opportunity to litigate its federal claims. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that a state court's decision will be deemed final for jurisdictional purposes "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. This case falls squarely within that category: the Alabama courts have now finally rejected Grove's due process claim, and Alabama law precludes Grove from obtaining later review of that claim.

The Supreme Court of Alabama has "long held that mandamus, not appeal, is the proper remedy if a judge refuses to recuse himself." *Ex parte Balogun*, 516 So.2d 606, 608 (Ala. 1987) (citing cases); *see, e.g.*, *Ex parte Kiker*, 612 So.2d 453, 455 (Ala. 1993); *Ex parte Melof*, 553 So.2d 554, 555 (Ala. 1989); *cf. Ex parte Central States Health & Life Co. of Omaha*, 594 So.2d 80, 81 (Ala. 1992) (holding that review of a lower court's ruling on a motion to disqualify an attorney "is by a petition for writ of mandamus only"). In *NAACP v. Alabama*, 150 So.2d 677 (Ala. 1963), *rev'd on other grounds*, 377 U.S. 288 (1964), the court applied that principle in refusing to consider a recusal issue on an appeal from a final judgment where the same issue had previously been raised by way of petition for writ of mandamus. *See id.* at 681 ("We hold that appellant cannot now raise the [recusal] question on appeal which it had raised in the mandamus proceeding"). These cases make clear that Grove is precluded from obtaining further review in the Alabama courts, and accordingly the decision below is final under *Cox Broadcasting Co.*

2. The decision below is also final because it involves a collateral matter, unrelated to the subject matter of the underlying case. It is well settled that this Court will treat "as final for its jurisdictional purposes a state court judgment which conclusively disposes of a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy." R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* 96 (7th ed. 1993); *see, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (holding that state supreme court's rejection of federal venue defense was "final" for purposes of 28 U.S.C. § 1257 even though the case had yet to go to trial). In this case, the Supreme Court of Alabama has "conclusively dispose[d]" of Grove's due process claim by denying its petition for a writ of mandamus; the disqualification issue is entirely unrelated to the underlying products liability action, and thus is "distinct from the general subject of the litigation"; and the recusal issue involves only the parties to this case.

In view of these authorities, it is apparent that the Supreme Court of Alabama's denial of Grove's petition for a writ of mandamus amounts to a final adjudication of Grove's due process challenge to the continued involvement of Judge Monroe in this case. Accordingly, the ruling below is final, and this Court has jurisdiction to review Grove's federal claim.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court Of Alabama's Rejection Of Grove's Due Process Claim Conflicts With Applicable Decisions Of This Court

"[A] fair tribunal is a basis requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see, e.g., Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971). "Fairness of course requires an absence of actual bias in the trial of cases." *Murchison*, 349 U.S. at 136. But due process requires more

than impartiality in fact; even an *appearance* of bias on the part of a judicial officer can violate the Due Process Clause. *Id.* As a consequence, the requirements of due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). *Accord Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

Accordingly, the Due Process Clause requires disqualification of a judge whenever the "'situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 822 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *accord Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 865 n.12; *Murchison*, 349 U.S. at 136. Under that standard, judicial officers in the position of Judge Monroe must be disqualified so that "'justice [will] satisfy the appearance of justice.'" *Id.*

That the Due Process Clause requires disqualification in the circumstances of this case is made plain by this Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968). In that case, which involved a challenge to an arbitration award, the supposedly "neutral" arbitrator had had a "sporadic" but "significant" business relationship with a prime contractor that was a party to the arbitration. *Id.* at 146. The relationship "involv[ed] fees of about $12,000 over a period of four or five years," but "there had been no dealings between them for about a year immediately preceding the arbitration." *Id.* Neither the arbitrator nor the prime contractor revealed the prior business dealings to the other party.

Applying the test laid down in *Tumey v. Ohio* and its progeny, this Court had little difficulty in concluding that the Due Process Clause would forbid a judge from presiding over a case in such circumstances: "We have no doubt that if a litigant could show that . . . a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge." 393 U.S. at 148 (citing *Tumey*).[4] Declining to hold arbitrators to a lesser standard in these circumstances,[5] the Court concluded that the arbitrator was disqualified and that the arbitration award was invalid.[6]

Commonwealth Coatings plainly mandates disqualification in the circumstances of this case. Here, Judge Monroe referred at least three clients to Hare, Wynn (evidently in exchange for potential referral fees), and later received substantial fees from the firm both before and during the pendency of this lawsuit in which the firm represents a party.

---

[4] The *Commonwealth Coatings* Court also went on to suggest that disqualification should be required where there is "'the slightest pecuniary interest' on the part of the judge" (393 U.S. at 148), a suggestion that was rejected in later cases. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 825 n.3. The Court's rejection of that aspect of *Commonwealth Coatings* does not, of course, undermine the other portions of *Commonwealth Coatings* discussed in text.

[5] In a concurring opinion, Justice White (joined by Justice Marshall) refused to join the other four members of the majority in holding that arbitrators are subject in all circumstances to the same stringent standards applicable to judges. *See* 393 U.S. at 150 (White, J., concurring). Justice White did agree, however, that even an arbitrator is disqualified where he or she has a non-trivial business relationship with a party and fails to disclose that relationship. *Id.*

[6] Because *Commonwealth Coatings* involved an arbitrator rather than a judge, the governing standard for disqualification was that set forth in the Federal Arbitration Act, 9 U.S.C. § 10(b), rather than the Due Process Clause. Nonetheless, *Commonwealth Coatings* is controlling on the due process issue in this case, because the Court construed the statute by analogy to constitutional requirements. *See* 393 U.S. at 148 (looking to *Tumey v. Ohio* for guidance in ascertaining the obligations of arbitrators under the Federal Arbitration Act).

Moreover, it is undisputed that "neither [Judge Monroe] nor [Hare, Wynn] gave to [Grove] even an intimation of the close financial relations that ha[ve] existed between them for a period of years." 393 U.S. at 147-48. Just as in *Commonwealth Coatings*, therefore, there can be "no doubt" that Judge Monroe's continued participation in this case is impermissible. *Id.* at 148.

The necessity for disqualification is considerably greater in this case than it was in *Commonwealth Coatings*, because the concealed financial relationship at issue here was not limited to pre-adjudication conduct but in fact continued during the pendency of this litigation.[7] Thus, *Commonwealth Coatings* makes clear that the Due Process Clause forbids Judge Monroe's continued participation in this case. Accordingly, this Court should grant certiorari to review the decision of the Supreme Court of Alabama, which rejects Grove's due process claim "in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

B. The Supreme Court Of Alabama's Rejection of Grove's Due Process Claim Conflicts With The Decisions Of Other Federal And State Appellate Courts

The decision below is inconsistent with numerous decisions of other appellate courts. In the first place, other state

[7] To be sure, the arbitrator's relationship in *Commonwealth Coatings* was with an actual party, whereas Judge Monroe's relationship is with the law firm representing the plaintiff in this case. That distinction is of no consequence, however, because it is a matter of common knowledge that counsel for plaintiffs in products liability suits generally have a direct interest in the outcome of those cases. The appearance of impropriety is, therefore, just as great as it would be if Hare, Wynn were a party rather than counsel for a party. *See Johnston v. Security Ins. Co.*, 6 Cal. App. 3d 839, 843, 86 Cal. Rptr. 133 (1970); *see also Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110-12 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *In re Fiftieth Dist. Court Judge*, 483 N.W.2d 676, 679 (Mich. App. 1992); *Caleffe v. Vitale*, 488 So.2d 627, 629 (Fla. App. 1986).

and federal courts have held that the existence of comparable business relationships between a judicial officer and a party or attorney requires the judge's disqualification. In addition, at least one court has held, and others have suggested, that a judge cannot preside over a case after accepting a substantial campaign contribution from counsel for one of the parties. Certiorari is therefore warranted to resolve these conflicts.

1. A number of state and federal courts have concluded that business connections closely analogous to the relationship at issue in this case require disqualification of the judge. For example, in *In re Fiftieth Dist. Court Judge*, 483 N.W.2d 676 (Mich. App. 1992), the trial judge had a joint ownership interest in the property on which was located the offices of the law firm for one of the parties, and had received compensation from the law firm in the form of the firm's assumption of mortgage payments on that property. The court held that recusal was required, explaining: "We believe that where, as here, the judge's economic relationship with a law firm is more than de minimis, *automatic disqualification is required.*" 483 N.W.2d at 679 (emphasis added). By the same token, Judge Monroe's substantial and ongoing financial relationship with Hare, Wynn, involving long-term financial obligations for referral fees that culminated in substantial payments, was plainly "more than de minimis" and should have resulted in "automatic disqualification."

Similarly, in *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), the court was faced with a claim that a district judge's relationship with the attorney for one of the parties created an appearance of partiality requiring recusal. The judge had invested in unrelated real estate ventures with the attorney, and the attorney had represented the judge in litigation matters related to those investments. The Fifth Circuit held that recusal was required, explaining: "We believe that a reasonable person with knowledge of the business investments of [the judge] and [the attorney] and the legal representation of the judge

by [the attorney] might very well question the judge's impartiality in a trial involving [the attorney] as chief counsel for a litigant." 609 F.2d at 1111.[8]

In the present case, the financial relationship entailed by the referral fee arrangement was much closer than that at issue in *Potashnick*: the extent of Judge Monroe's ultimate compensation depended directly on the efforts and success of Hare, Wynn in the referred cases. Moreover, the judge's campaign manager and office administrator was one of the clients referred by the judge and represented by the firm, further strengthening the close relationship involved in this case. Under *Potashnick*, recusal was plainly required.

Numerous other courts have reached the same result in analogous circumstances.[9] In a few instances, however, courts

---

[8] The *Potashnick* court applied 28 U.S.C. § 455(a), rather than the Due Process Clause, in concluding that recusal was required. As the court recognized, however, Section 455(a)—which requires recusal whenever a judge's "impartiality might reasonably be questioned"—is essentially an "appearance of impartiality" statute. 609 F.2d at 1111. Like Section 455(a), the Due Process Clause also focuses on "appearance[s]" (*Offutt v. United States*, 348 U.S. at 14), and requires recusal even absent actual bias where a judge's relationship with the case or the participants therein "'"offer[s] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 822. Thus, *Potashnick* is directly relevant to the due process issue in this case.

[9] *See, e.g., Fein v. Fein*, 610 N.Y.S.2d 1002, 1004-06 (Sup. Ct. 1994) (refusing to enforce arbitral award where arbitrator had had long-term financial dealings with a party involving up to $5,000); *James D. Morrisey, Inc. v. Gross Construction Co.*, 443 A.2d 344, 348-49 (Pa. Super. 1982) (holding that arbitrator should have disqualified himself because he failed to disclose fact that he had continuing business relationship with a party) (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968)); *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 220-21, 224 (N.J. 1981) (disqualifying arbitrator and vacating arbitral award where arbitrator had performed services for a party and as a result was owed sub-

[Footnote continued on next page]

have agreed with the Alabama Supreme Court that financial relations between a judge and a party or attorney like those at issue in this case do not require disqualification.[10] This Court should grant certiorari to resolve this widening conflict. *See* Sup. Ct. R. 10.1(b).

2. There is also considerable judicial disagreement over the question whether a judge is disqualified by his or her acceptance of political contributions from counsel to a party in a pending case. In this case, of course, Judge Monroe had accepted $8,000 in campaign contributions from Hare, Wynn prior to the commencement of the lawsuit, and thereafter he accepted an additional $5,000 in contributions from the firm. Nonetheless, the Supreme Court of Alabama held that these contributions were not sufficient to require the judge's disqualification as a matter of due process.[11]

[Footnote continued from previous page]

stantial sums of money by the party during the pendency of the arbitration proceeding) (citing *Commonwealth Coatings, supra*); *Johnston v. Security Ins. Co. of Hartford*, 6 Cal. App. 3d 839, 843-44, 86 Cal. Rptr. 133 (1970) (vacating arbitral award because arbitrator failed to disclose fact that he had repeatedly referred cases to one party's expert witness) (citing *Commonwealth Coatings, supra*); *see also Schmitz v. Zilveti*, 20 F.3d 1043, 1048-49 (9th Cir. 1994); *In re Drexel Burnham Lambert Inc.*, 869 F.2d 116, 119-20 (2d Cir.) (Newman, J., dissenting from denial of rehearing en banc), *cert. denied*, 490 U.S. 1102 (1989); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1199-1202 (11th Cir. 1982); *Matter of Lawrence*, 335 N.W.2d 456, 458-59 (Mich. 1983).

[10] *See, e.g., United States v. Couch*, 896 F.2d 78, 79-82 (5th Cir. 1990) (finding no due process violation where trial judge had joint investments with moving party); *In re Beard*, 811 F.2d 818, 830-31 (4th Cir. 1987) (declining to disqualify judge based on his financial and legal connections with counsel for a party).

[11] Justices of the Supreme Court of Alabama are unlikely to perceive campaign contributions as occasions for disqualification since they must also run for office and regularly solicit and accept substantial campaign contributions from law firms. *Mobile Register*, July 17, 1994, at p. 1.

A number of other state appellate courts have held that an attorney's campaign contributions to a judge, standing alone, will not necessarily require disqualification of the judge. *See, e.g., MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335-38 (Fla. 1990); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 844-45 (Tex. App. 1987), *cert dismissed*, 485 U.S. 994 (1988).[12] In *Brown v. Brown*, 397 S.E.2d 545 (Va. App. 1990), however, the Court of Appeals of Virginia concluded that recusal was required when a commissioner in chancery (a quasi-judicial officer responsible for preparing a report for submission to the trial judge) accepted a $500 campaign contribution from counsel for a party during the pendency of the case. *See* 397 S.E.2d at 547-48 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954), for the proposition that "justice must satisfy the appearance of justice"). *Brown* is squarely inconsistent with the holding of the Supreme Court of Alabama in this case.

Similarly, in *In re Mason*, 916 F.2d 384 (7th Cir. 1990), the court held that a judge's past campaign contributions to parties in a case did not require disqualification, but went on to observe that "we might have a much more difficult case if, as occurs in many states, the attorney gave significant financial support to the judge's campaign committee *while the judge was on the bench. Such contributions create opportunities to curry favor, and large ones could require disqualification.*" *Id.* at 387-88 (emphasis added). *See also*

---

[12] Even these courts generally recognize that the combination of campaign contributions and other factors may give rise to an appearance of impropriety requiring disqualification. *See, e.g., MacKenzie v. Super Kids Bargain Store*, 565 So.2d at 1338 n.5 ("Although a motion for disqualification based *solely* upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion."). *See also* S.D. Stat., tit. 16, ch. 16-2, App., Canon 5C(2), commentary ("Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification").

Breakstone v. MacKenzie, 561 So.2d 1164, 1166-72 (Fla. App. 1989) (concluding that counsel's campaign contribution to judge's spouse required disqualification), *quashed in pertinent part*, 565 So.2d 1332 (Fla.), *and vacated in pertinent part*, 571 So.2d 32 (Fla. App. 1990). In short, the lower federal and state courts are in sharp disagreement over the correct answer to the question whether a judicial officer may continue to act in a case after accepting substantial campaign contributions from counsel for a party. This case presents an appropriate opportunity for this Court to resolve that disagreement.

C. The Petition Presents An Important Federal Question That Should Be Resolved By This Court

As indicated by the numerous cases cited above, the question whether a financial relationship between a judge and a party or attorney requires disqualification is one that arises with considerable frequency, and one that has left the lower courts in considerable confusion. This Court has not had occasion to address that precise question since 1968, when it decided *Commonwealth Coatings Corp. v. Continental Cas. Co.*, *supra*. Further guidance for the lower courts in this important area is obviously needed.

Moreover, this Court has never addressed the question whether (or under what circumstances) the Due Process Clause requires disqualification of a judge who accepts political campaign contributions from a party's attorney during the pendency of a case. That question has already arisen in several States, and is of obvious importance in view of the numerous States that permit political contributions in support of the electoral campaigns of state judges.[13] Ultimate resolution of that question should not be left to judges who,

---

[13] *See, e.g.*, Ala. Code § 17-22A-8; Ariz. Rev. Stat. Ann. § 16-913(E); Fla. Stat. § 105.08(1); Ind. Code § 33-5-5.1-29.5; Md. Elec. Code §§ 1-1(a)(4), 26-9; Nev. Rev. Stat. § 294A.110; N.Y. Code of Prof'l Resp., DR 7-110, 22 N.Y. C.R.R. § 1200.41; S.D. Stat. tit. 16, ch. 16-2, App., Canon 5C(2).

like the Justices of the Supreme Court of Alabama, are themselves necessarily participants in the very practice—solicitation and acceptance of judicial campaign contributions—that is the subject of challenge. Review by this Court is therefore warranted, because in concluding that Judge Monroe can preside over this case despite his receipt and acceptance of substantial campaign contributions from Lowe's counsel, the Supreme Court of Alabama "has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

August 2, 1994

Respectfully submitted.

OF COUNSEL:

DONALD F. PIERCE
H. WILLIAM WASDEN
PIERCE, CARR & ALFORD, P.C.
Suite 900
1110 Montlimar Drive
Mobile, Alabama 36609
(205) 344-5151

* THEODORE B. OLSON
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
* *Counsel of Record*

APPENDIX A

IN THE SUPREME COURT OF ALABAMA
MARCH 22, 1994

1930624

Ex parte Grove North America, Division of Kidde Industries, Inc.

PETITION FOR WRIT OF MANDAMUS

(Re: Richard Douglas Lowe v. Grove North America, Division of Kidde Industries, Inc., et al. (CV-91-3246))

ORDER

The petition for writ of mandamus to be directed to the Honorable Roger Monroe, Judge of the Circuit Court of Jefferson County, Alabama, having been duly filed and submitted to the Court,

IT IS CONSIDERED AND ORDERED that the petition for writ of mandamus is denied.

Almon, Shores, Houston, Steagall, Ingram, and Cook, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-91-3246

RICHARD DOUGLAS LOWE,
Plaintiff

v.

GROVE NORTH AMERICA, Division of
KIDDE INDUSTRIES, INC., a corporation, et al.,
Defendants

CASE ACTION SUMMARY
CONTINUATION

DATE	ACTIONS, JUDGMENTS, CASE NOTES
	* * * * *
12-10-93	Deft's motion for recusal is hereby OVERRULED.
12-10-93	Deft's amended mot. for recusal is also OVERRULED. cc: counsel

/s/ Roger Monroe
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
April 18, 1994

1930624

Ex parte Grove North America, Division of Kidde Industries, Inc.

PETITION FOR WRIT OF MANDAMUS

(Re: Richard Douglas Lowe v. Grove North America, Division of Kidde Industries, Inc., et al. (CV-91-3246))

ORDER

The petitioner having filed an [sic] motion for rehearing of this Court's order denying the petition for writ of mandamus on March 22, 1994, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion for rehearing is denied.

Shores, Houston, Steagall, Kennedy, Ingram, and Cook, JJ., concur.

APPENDIX D

STATE OF ALABAMA)

JEFFERSON COUNTY)

AFFIDAVIT

Personally appeared before me, the undersigned notary public, in and for said county and state, John W. Haley, who is known to me and who, after being duly sworn by me, deposes and says as follows:

1. My name is John W. Haley and I am a partner in the law firm of Hare, Wynn, Newell & Newton.

2. Sometime in the Fall of 1993, I had a conversation with Robert Esdale about cases referred to Hare, Wynn, Newell & Newton by Judge Monroe. Mr. Esdale asked if our firm had paid to Judge Monroe any referral fees after he became a circuit court judge. I told Mr. Esdale that, to my knowledge, I was the only lawyer who had worked with Roger Monroe other than Terrell Wynn. I knew that I had concluded the case of Johnny Williams and Alex Polke v. Chemical Waste Management and had made a payment to Judge Monroe of his share of the referral fee. I told Mr. Esdale that I would check to find out how much was paid to Judge Monroe, when it was paid, and whether Terrell had concluded any cases.

3. I checked our records and found that Judge Monroe had been paid $23,937.33 on June 4, 1992, which was fifty percent of the fees in Williams and Polke v. Chem Waste, and so advised Mr. Esdale. I asked Terrell Wynn if he knew of any cases that had been referred to our firm by Roger Monroe and concluded after he became a circuit judge. I also told him that, to my knowledge and that of Terrell Wynn, there were no other fees that had been paid to him after he became a judge.

4. I have since learned that Patrick Lavette handled a case for Lisa Lewis and Judge Monroe was paid a referral fee of $2,136.99 on March 1, 1991. I did not learn of that fee until December 6, 1993, and was unaware of that case being handled by my office at the time I talked with Mr. Esdale.

I have read the above and foregoing and it is true and correct to the best of my knowledge and belief.

/s/
John W. Haley
Attorney for Plaintiff
HARE, WYNN, NEWELL & NEWTON
Suite 800, Massey Building
290 - 21st Street, North
Birmingham, Alabama 35203
(205) 328-5330

Sworn to and subscribed before me this the 9th day of December, 1993.

/s/
Notary Public

My Commission Expires: 10/31/95

[SEAL]

APPENDIX E

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, ALABAMA

RICHARD DOUGLAS LOWE, et al.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. CV 91-3246
GROVE MANUFACTURING COMPANY,	)	
COWIN EQUIPMENT COMPANY,	)	
INC., et al.	)	
	)	
Defendants.	)	

RESPONSE TO DEFENDANT'S SUBPOENA

COME the Plaintiffs in the above-styled cause, and in response to discovery requested says as follows:

Referral Fees:

YEAR	CASE NAME	REFERRAL FEE	HWN&N FEE
1991	Lewis v. Mitchell	2,136.95	2,136.95
1992	Polke v. ChemWaste	5,960.52	5,960.53
	Williams v. ChemWaste	17,976.81	17,976.82
		$26,074.28	$26,074.30

Political Contributions:

YEAR	AMOUNT
1990	8,000.00
1993	5,000.00

/s/ _____
TERRELL WYNN

OF COUNSEL:
HARE, WYNN, NEWELL & NEWTON
The Massey Building, Suite 800
290 21st Street North
Birmingham, Alabama 35203-3713
(205) 328-5330

Supreme Court, U.S.
FILED
SEP 2 1994
OFFICE OF THE CLERK

(2)

No. 94-196

IN THE

Supreme Court Of The United States

October Term, 1994

Grove North America, Division of
Kidde Industries, Inc., a corporation,
Petitioner,

v.

Richard Douglas Lowe and Honorable Roger Monroe,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

RESPONDENT LOWE'S BRIEF IN OPPOSITION

TERRELL WYNN
BRUCE J. MCKEE*
Hare, Wynn, Newell and Newton
The Massey Building
Suite 800
290 21st Street, North
Birmingham, Alabama 35203-3713
(205) 328-5330

Attorneys for Respondent Lowe

**Counsel of Record*

19pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

I. Whether the federal due process claim was adequately presented below when Petitioner stated in the state courts its ground for recusal to be Canon 3C(1) of the Alabama Canons of Judicial Ethics, not federal due process.

II. Whether a substantial federal due process issue is presented concerning a judge's recusal when an elected state trial judge received only $13,000 in total campaign contributions (for two separate campaigns) and a total of $26,000 in referral fees from Respondent's law firm (where the referral contracts were executed *before* the practicing lawyer became a judge, but the cases did not settle until after he took the bench).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

I. THE FEDERAL DUE PROCESS ISSUE WAS NOT PRESENTED TO THE TRIAL COURT OR TO THE SUPREME COURT OF ALABAMA 5

II. THE RECUSAL ISSUE PRESENTED DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: *Page*

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 78, 108 S. Ct. 1645, 1650 (1988) 6

Banks v. Herbin, 500 So.2d 1027, 1030 (Ala. 1986) 7

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987) 7

Brown v. Brown, 11 Va. App. 231, 397 S.E.2d 545 (Va. App. 1990) 10

Clark v. Jeter, 486 U.S. 456, 458, 108 S. Ct. 1910, 1913 (1988) 6

Collins v. Dixie Transport, Inc., 543 So.2d 160, 166 (Miss. 1989) 2

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337 (1968) 12

Exxon Corp. v. Eagerton, 462 U.S. 176, 103 S. Ct. 2296, 2300 n. 3 (1983) 7

Fiftieth District Court Judge, In re, 193 Mich. App. 209, 483 N.W.2d 676 (Mich. App. 1992) 11

Haralson v. Haralson, 483 So.2d 378, 380 (Miss. 1986) 2

Heath v. Alabama, 474 U.S. 82, 87, 106 S. Ct. 433, 437 (1985) 6

Illinois v. Gates, 462 U.S. 213, 221-22, 103 S. Ct. 2317, 2323 (1983) 6

Kirkland v. Kirkland, 281 Ala. 42, 47, 198 So.2d 771, 777 (1967) 7

TABLE OF AUTHORITIES (continued)

Cases: *Page*

Murchison, In re, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) 1, 2, 3, 4, 8, 12

Offfutt v. United States, 340 U.S. 11, 14 (1955) 1, 2

Potashnick v. Port City Const. Co., 609 F.2d 1101, 1112 (5th Cir. 1980) 2, 11

Prudential Federal Savings & Loan Association v. Flanigan, 478 U.S. 1311, 107 S. Ct. 38 (1986) 7

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S. Ct. 614 (1955) 9

Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. Ct. App. 1983) 10

Smith v. State, 212 Miss. 497, 54 So.2d 739, 741 (Miss. 1951) 3

Stover v. Alabama Farm Bureau Ins. Co., 467 So.2d 251, 253 (Ala. 1985) 7

Taylor v. Illinois, 484 U.S. 400, 406, 108 S. Ct. 646, 651 n. 9 (1988) 6

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 1893-94 (1981) 6

West Town Plaza Associates, Ltd. v. Wal-Mart Stores, Inc., 619 So.2d 1290, 1294 (Ala. 1993) 7

Whisenant v. State, 555 So.2d 219, 223 (Ala. Cr. App. 1988) 2

Yee v. City of Escondido, 112 S. Ct. 1522, 1531 (1992) 6

TABLE OF AUTHORITIES (continued)

Constitution, Statutes and Rules: *Page*

28 U.S.C. § 1257 5

28 U.S.C. § 1257(a) 5

Canon 3C(1) of the Alabama Canons of Judicial Ethics 1, 2, 4

Other Authorities:

12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶ 510.01, p. 8-56 (2d ed. 1993) 5, 9

16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Eugene Gressman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 702-03 (1977) 5

STATEMENT OF THE CASE

A. Facts Material to the Question Presented

Respondent Lowe has no disagreement with the facts as stated by Petitioner.

B. How the Federal Question was Raised

Respondent Lowe, however, asserts that the federal due process issue was *not* presented to the trial court or to the Alabama Supreme Court (until Grove's application for rehearing, which procedurally is too late).

At p. 4 of the Petition, Grove asserts that it presented this issue to the trial court because p. 3 of its trial court brief cited *Murchison* and *Offutt*. Here are the pertinent portions of "Defendant Grove North America's Memorandum Brief in Support of Motion for Recusal," served in the trial court on October 6, 1993:

> **ARGUMENT**
>
> **A. Grounds for Recusal**
>
> Recusal is required under Canon 3 C(1) of the Alabama Canons of Judicial Ethics when the facts are such that it is reasonable for a party, for members of the public, or for counsel to question the impartiality of a trial judge. Recusal is required when accusations are supported by proof of facts showing a conflict. [citations to Alabama cases omitted]. The test under that canon is "'[w]ould a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis to question the judge's impartiality?'" [Alabama citations omitted].
>
> The reasonable person/appearance of impropriety test, as articulated in Canon 3 C(1), in the words of the Supreme Court of the United

States, may "[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). Canon 1 of the Code of Judicial Ethics states, "[a]n independent and honorable judiciary is indispensable to justice in our society." The stature of the judiciary requires avoiding *all appearance* of impropriety, even requiring the resolution of all reasonable doubt *in favor of recusal.* [Alabama citation omitted].

. . .

The question of disqualification is not whether a judge actually *is* biased, for a judge must be disqualified, "without finding fault . . . so that even the appearance of impropriety can be avoided." *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (Miss. 1989) (*emphasis in original*) (*quoting Haralson v. Haralson*, 483 So.2d 378, 380 (Miss. 1986)). This principal derives from the ethical proscription which governs the judiciary: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3 C(1), Alabama Canons of Judicial Ethics. *See also Whisenant v. State*, 555 So.2d 219, 223 (Ala. Cr. App. 1988). "An Alabama judge must exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case." *Potashnick v. Port City Const. Co.*, 609 F.2d. 1101, 1112 (5th Cir. 1980). Therefore, even when this court may be sure that he will strive to be absolutely impartial, disqualification is rightly required so that "justice [will] satisfy the appearance of justice." *Murchison, supra*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955), *quoting Offutt v. United States*,

340 U.S. 11, 14 (1955) (*emphasis supplied*); *Smith v. State*, 212 Miss. 497, 54 So.2d 739, 741 (Miss. 1951).

. . .

B. The Need for Further Disclosure

The duty rests upon the trial judge to act *sua sponte* on any hint that disqualification may be appropriate.

. . .

In the event that this Court decides that recusal is not supported by the facts and arguments submitted herein, defendant Grove North America respectfully suggests that this Court should consider whether any potential bases for recusal exist which have not been raised in defendant's Motion for Recusal. If they do, defendant requests that they be made known to counsel for all parties, in open court, so that the parties may properly evaluate whether further motions to unseal financial disclosure statements and arguments on disqualification would be appropriate.

CONCLUSION

WHEREFORE, defendant Grove North America, Division of Kidde Industries, Inc., moves that the Hon. Roger Monroe issue an order recusing himself from further participation in this matter, or, alternatively, disclose any potential bases for disqualification in this case based on past client referrals to plaintiff's counsel or other financial conflicts of interest.

Similarly, at p. 5 of its Petition, Grove asserts that the federal due process issue was raised in the Alabama Supreme Court because it cited *Murchison* in its petition and brief. Grove's Petition for Writ of Mandamus, served

on the Alabama Supreme Court on February 11, 1994, concluded thusly:

> **GROUNDS FOR ISSUANCE OF THE WRIT**
>
> Judge Monroe's impartiality might be reasonably questioned in view of the facts set forth above. Pursuant to the Alabama Canons of Judicial Ethics, specifically Canon 3 C(1), and the authorities cited in Petitioner's brief filed herewith, the writ should issue along with the order directing disqualification and recusal.

Grove's Alabama Supreme Court brief of February 11, 1994, is virtually word-for-word a reprint of its trial court brief. The Alabama petition and brief make absolutely no reference to "due process," and do not assert any reliance on the federal constitution as a reason or ground for granting its petition for writ of mandamus to require the recusal of Judge Monroe. The specific ground for relief is stated (p. 2 of Feb. 11, 1994, brief) as: "Recusal under Canon 3 C(1)," not federal due process. *Murchison* is cited (p. 3 of Feb. 11, 1994), exactly as quoted above from Grove's trial court brief.

Grove's petition was denied without opinion by order of the Alabama Supreme Court, dated March 22, 1994. On April 5, 1994, Grove filed a "Motion for Rehearing," and a brief in support thereof. For the very first time in this case, a federal ground was asserted. Page 3, par. 5, of Grove's Motion for Rehearing asserts:

> Judge Monroe's participation in this case violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment . . .

The subtitle on p. 3 of the accompanying brief asserts, for the first time:

> c. *The Respondent Trial Judge's Ongoing Financial Relationship with the Plaintiff's Counsel Violates Petitioner's Rights to Due Process.*

The Alabama Supreme Court denied the Motion for Rehearing without opinion on April 18, 1994.

C. The Decision Below is Final

Respondent Lowe agrees that the action of the Alabama Supreme Court is final for purposes of 28 U.S.C. § 1257 review.

REASONS FOR DENYING THE PETITION

I.

THE FEDERAL DUE PROCESS ISSUE WAS NOT PRESENTED TO THE TRIAL COURT OR TO THE SUPREME COURT OF ALABAMA

The phrases "drawn in question" and "specially set up or claimed under the constitution," in 28 U.S.C. § 1257(a) "mean that the federal question must have been duly raised in the state court." 12 James William Moore, Helen I. Bendix, and Brett A. Ringle, Moore's Federal Practice ¶ 510.01, p. 8-56 (2d ed. 1993). "The purposes of the requirement that a federal question be raised in the state courts plainly are not satisfied if one question is presented to the state courts and a different question is presented to the Supreme Court. . . . Similarly, an argument that was initially presented to the state court in terms of state law cannot be shifted tardily into a constitutional argument . . . [I]t is not sufficient to show that the federal question advanced in the Supreme Court merely has some connection to the issue advanced in the state courts." 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Eugene Gressman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 702-03 (1977).

"In reviewing the judgments of state courts . . . the Court has, with very rare exceptions, refused to consider

petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992). "[I]t is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 458, 108 S. Ct. 1910, 1913 (1988). There is "a weighty presumption against review" of claims not pressed below. *Heath v. Alabama*, 474 U.S. 82, 87, 106 S. Ct. 433, 437 (1985). The reasons for this strict rule include: (1) presentation of the federal issue to the state court helps ensure that an adequate record is made; (2) it gives due regard to appropriate relations between the Supreme Court and state courts; and (3) it gives the state court a chance to rely on state grounds. *Illinois v. Gates*, 462 U.S. 213, 221-22, 103 S. Ct. 2317, 2323 (1983). Also, a reasoned state court opinion on the issue may obviate the need for plenary consideration by the Supreme Court. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 1893-94 (1981).

"A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim . . . ." *Taylor v. Illinois*, 484 U.S. 400, 406, 108 S. Ct. 646, 651 n. 9 (1988). At minimum, "there should be no doubt from the record that a claim under a federal statute on the Federal Constitution was presented in the state courts and that those courts were apprised of the nature of substance of the federal claim at the time and in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 1894 (1981). "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78, 108 S. Ct. 1645, 1650 (1988).

Alabama appellate courts will not consider issues raised for the first time on appeal. See, as one of many ex-

amples, *West Town Plaza Associates, Ltd. v. Wal-Mart Stores, Inc.*, 619 So.2d 1290, 1294 (Ala. 1993). This Court recognized this principle in the Alabama case of *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S. Ct. 2296, 2300 n. 3 (1983), where it was said this Court had "no jurisdiction" to consider an argument made for the first time to the Alabama Supreme Court. "The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Id.* Also, when the state supreme court does not discuss the federal issue, it is assumed that the omission was because the issue was not procedurally raised in a timely or proper manner. The aggrieved party has the burden of showing the contrary. *Id.*

More specifically, *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251, 253 (Ala. 1985), notes that: "New supporting arguments presented for the first time on rehearing generally will not be considered." "An application for rehearing on [a] ground not argued or suggested until after our judgment was rendered cannot be now considered." *Banks v. Herbin*, 500 So.2d 1027, 1030 (Ala. 1986), (*quoting Kirkland v. Kirkland*, 281 Ala. 42, 47, 198 So.2d 771, 777 (1967)). *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 (1987), refused to review a constitutional question which was first clearly raised in the state supreme court application for rehearing. The state court denied the application without opinion [like in this case], and this Court assumed that action was based upon the failure to timely present the issue. *See also Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311, 107 S. Ct. 38 (1986) (rehearing too late). "The long-established general rule is that an initial attempt to raise a federal question after judgment by the highest court, upon a petition for rehearing, comes too late, unless that court actually entertains the question and decides it." Moore's, *supra*, at p. 8-61.

In this case, "due process" was never even mentioned to the trial court, much less specifically "pressed" as a ground for relief. The specific ground relied upon by Grove was Canon 3 C(1) of the Alabama Canon of Judicial Ethics. The same limited argument was presented in Grove's petition for writ of mandamus filed in the Alabama Supreme Court. "Due process" was not mentioned until Grove's application for rehearing. Grove's only argument for having presented the question below is that its brief cited *Murchison*. The full "*Murchison*" citations, from Grove's briefs, read:

> The reasonable person/appearance of impropriety test, as articulated in Canon 3 C(1), in the words of the Supreme Court of the United States, may "[s]ometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L Ed. 942 (1955). Canon 1 of the Code of Judicial Ethics states, "[a]n independent and honorable judiciary is indispensable to justice in our society." The stature of the judiciary requires avoiding *all appearance* of impropriety, even requiring the resolution of all reasonable doubt *in favor of recusal.*
>
> . . .
>
> Therefore, even when this court may be sure that he will strive to be absolutely impartial, disqualification is rightly required so that "justice [will] satisfy the appearance of justice." *Murchison, supra*, 349 U.S. 133, 136 . . .

This vague citation, squeezed between the two Alabama rules being principally relied upon, is totally insufficient to raise any issue regarding any federal due process ground for Judge Monroe's recusal. The due process argument was *NOT* made by Grove until its application

for rehearing to the Alabama Supreme Court. Thus, the federal issue presented by Grove in its petition to this Court was *NOT* adequately presented to the state courts.

II.

THE RECUSAL ISSUE PRESENTED DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

"To afford the basis for review, the federal question must be substantial." Moore's, *supra*, at ¶ 512.01, p. 8-73. Questions regarding the methods of selection of state judges and the financing of judicial elections are important societal issues, but they were not adequately raised in this record. Also, a contribution of $8,000 to a trial judge's campaign, and a $5,000 contribution to his later appellate court campaign simply does not raise a *substantial* issue about whether due process requires recusal. Furthermore, a sitting judge receiving a previously-agreed percentage referral fee ($26,000 total) in three cases he referred *before* becoming a judge also fails to raise any federal constitutional issue, substantial or otherwise. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . ." Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

There is no "split of authority" in this country on the issue of campaign contributions to judges. Page 15 of Grove's petition asserts that one court has ruled that contributions require recusal. It is amazing that Grove would cite *Brown v. Brown*, 11 Va. App. 231, 397 S.E.2d 545 (Va. App. 1990), because that case involved a lawyer in a pending case giving a political contribution to a "quasi-judicial officer" for a *non-judicial* political race. At 547-48, the Virginia Court specifically limited its holding:

> We reject as unpersuasive the analogy drawn to cases involving contributions made to judges in systems in which judges are popularly elected. Our own judicial system is not one which requires candidates for the bench to stand for election. Thus, we are not required to balance the influential aspects of contributions against the practicalities of conducting an election and then administering a judicial system following a judicial election campaign. *Compare Rocha v. Ahmad*, 662 S.W.2d 77,78 (Tex. Ct. App 1983). . . .

Rocha, at 78, states:

> It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races . . . If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

Even if this Court is interested in the issue of contributions to elected state judges, this record is too vague and

skimpy to support this Court's plenary review of this issue. The "record" in this case is primarily two or three pages of an affidavit and financial statement of the $13,000 in contributions and $26,000 in total referral fees. There are no facts in evidence about judicial races in Alabama, total and average amounts spent, where specific judges' contributions come from, etc. There is no demonstration of any "problem" in Alabama. The two separate contributions (totaling only $13,000) by one firm (which happens to be the largest plaintiff-oriented law firm in Alabama) to a judge for two separate judicial races (one a state-wide appellate court race) simply fail to raise a significant federal issue. [This really is a political question. If the people of Alabama want to switch to appointed judges, they can elect legislators who will propose such a constitutional amendment, then vote at the constitutional referendum.]

As to the referral fees, there is also a too-slim record in this particular case. (For example, for all this record shows, solo practitioner Roger Monroe might have had 90 files in his office when he was elected to the bench, and he may have referred three cases each to 30 separate law firms.) And, there is also a lack of any substantial disagreement among lower courts on the issue. Grove has not cited a single case wherein a court declared that recusal was required when a sitting judge received a referral fee from a case he referred *before* becoming a judge. There is not even an analogous case that relies on federal due process grounds.

Grove admits that *Potashnick* (discussed at pp. 12-13 of Petition) was not decided on due process grounds. *In re Fiftieth District Court Judge*, 193 Mich. App. 209, 483 N.W.2d 676 (Mich. App. 1992) (p. 12 of Petition), also is not a due process case, but is based on MCR 2.003. In the Michigan case, the judge jointly owned the land and the law firm's building. The firm paid all the real estate

taxes, and paid off a mortgage on which the judge was jointly liable. Such facts are far afield from Judge Monroe's receipt of settlement funds from pre-judgeship referrals.

The case that Grove relies upon to have raised its due process issue, *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955), merely held that the same human being could not serve as both the "one-man judge-grand jury" and the trial judge. "[N]o man is permitted to try cases where he has an interest in the outcome." 349 U.S. at 136, 75 S. Ct. at 625. In the case at bar, Judge Monroe has no financial stake or interest in the outcome of *Lowe v. Grove.*

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337 (1968) (pp. 9-11 of Petition), was based primarily on the Canons of Judicial Ethics and the Rules of the American Arbitration Association, not due process. The facts are easily distinguishable: The tainted arbitrator was an engineering consultant in Puerto Rico, and the contractor sued was "one of his regular customers in this business." 393 U.S. at 146, 89 S. Ct. at 338. "[T]he relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit." *Id.*

Besides having no supporting legal authority, Grove has failed to demonstrate any actual bias *in this case.* In this case, a lawyer referred a case and agreed to a percentage of the contingency fee as a referral fee (ethically permissible in Alabama and in many other states) – then the lawyer became a judge before the case terminated. In the referred case, the law firm has every incentive to maximize the recovery; and, as a matter of mathematics, the judge's referral fee increases as the total recovery increases. The judge does nothing: he has no control over the referred case, and there is nothing he can do in the case before him (*Lowe v. Grove*) which can in any way increase his share of the recovery in the referred case. In

other words, there is no "proximate cause" connection between *Lowe v. Grove* and the cases referred to the Hare firm before Judge Monroe took the bench. The Hare firm did, and would have done, its utmost to maximize the recovery in the referred cases, no matter what Judge Monroe did or did not do in the course of *Lowe v. Grove.* THIS PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS!

CONCLUSION

The petition for writ of certiorari is due to be denied.

Respectfully submitted this 2nd day of September, 1994.

TERRELL WYNN
BRUCE J. MCKEE*
Hare Wynn, Newell and Newton
The Massey Building
Suite 800
290 21st Street, North
Birmingham, Alabama 35203-3713
(205) 328-5330

Attorneys for Respondent Lowe

**Counsel of Record*

Supreme
F
SEP 2 1994
OFFICE OF THE CLERK

(3)

No. 94-196

IN THE

Supreme Court of the United States

October Term, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., A CORPORATION,
Petitioner,
v.
RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF AMICUS CURIAE OF THE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

Robert D. Daniel*
Michael D. Weiss
Daniel & Lezar
700 Louisiana Suite 3950
Houston, Texas 77002
Tel: (713) 228-6600
Fax: (713) 228-3112

Counsel for Amicus Curiae,
Texas Justice Foundation
*Counsel of Record

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

10 pp

QUESTION PRESENTED

Whether and in what circumstances the Due Process Clause of the Fourteenth Amendment requires disqualification of a state judge who receives campaign contributions or other financial benefits from a litigant or an attorney for a litigant in a case pending before the judge.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

SUMMARY 6

TABLE OF AUTHORITIES

Page

Cases

Aguilar v. Anderson,
855 S.W.2d 799 (Tex. App. -- El
Paso [8th Dist.] 1993, writ denied) 4

Sun Exploration v. Jackson,
783 S.W.2d 202 (Tex. 1988) 4

Statutes

Fourteenth Amendment . . . . . i, 2

Others

Charles Smith, *Judicial Fund*
Raising Rules Need to Be Changed,
Texas Lawyer, Jan. 27, 1992 at 10 4

Hon. Thomas Phillips, *Party, Money*
Shouldn't Decide Judicial Races,
Houston Chronicle, March 4, 1993 at A19 4

Judges and Dollars,
Houston Chronicle, Nov. 7, 1993,
Outlook Section, p.2 4

Melanie Harrell, *Rid Harris County*
Family Courts of Cronyism,
Houston Chronicle, Jan. 27, 1994 at A21 4

No. 94-196

IN THE
Supreme Court of the United States
October Term, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., A CORPORATION,
Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF AMICUS CURIAE OF THE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Texas Justice Foundation (the "Foundation") is a nonprofit corporation engaged in public interest litigation. The Foundation provides free legal representation in potentially landmark cases to enable impecunious litigants to seek to protect private or individual rights against illegal or unconstitutional incursions of government power. The Foundation accordingly supports and endorses government by rule of law and thus an independent, unbiased judiciary. The rule of law is significantly weakened, both in reality and perception, when judges accept significant campaign contributions or other financial benefits from parties or attorneys who appear before them. The Foundation submits

that due process should require both actual impartiality and the unquestionable appearance of impartiality in state judicial systems. All litigants must be equal before the law; justice should be blind. Financial contributions to judges, by contrast, make some litigants more equal than others and open the eyes of justice to considerations other than the rule of law. All parties have consented to the filing of this brief by the Texas Justice Foundation.

STATEMENT OF THE CASE

The direct payments by counsel to plaintiff in this case to the trial judge in this case raise in narrow terms the stark issue whether the Due Process Clause of the Fourteenth Amendment required the trial judge to disqualify himself from this particular case because of those payments. Because the due process concerns engendered by the facts of this case flow from the requirement that all litigation be resolved by an impartial tribunal, the case also necessarily raises -- particularly by reference to the Texas judicial system -- the broader issue of the due process limitations that should be imposed on an elected judiciary in the context of campaign contributions by active litigants or their attorneys.

SUMMARY OF ARGUMENT

The Foundation supports petitioner's third reason for granting a writ of certiorari in this case: namely, that the Petition presents an important federal question that should be resolved by this Court. All parties litigant are entitled to impartial tribunals to resolve disputes that are subject to state jurisdiction. The impartiality of state judiciaries, however, cannot be maintained unless this Court imposes meaningful constraints on the flow of money from affected litigants to state judges, particularly constraints on contributions to the campaigns of elected state judges.

ARGUMENT

By deciding the important question raised by petitioner, this Court would give the Texas courts and other state courts desperately needed guidance.

Virtually all members of the Texas judiciary are elected, unless initially appointed. Most Texas judges stand for periodic re-election. The Foundation is not aware of any Texas judge that has refused to accept contributions to his or her re-election campaign from lawyers with cases pending before the judge. Perhaps unsurprisingly, attorney campaign contributions to Texas judicial races have escalated to troublesome levels. The Texas Public Policy Foundation has found that "between July 1, 1991, and December 31, 1992, plaintiffs' personal injury trial lawyers contributed $1,493,330.16 or twenty-five percent of the total contributions ($5,999,349.97) to the six candidates for the Texas Supreme Court." An Analysis of Plaintiffs' Personal Injury Trial Lawyer Campaign Contributions to the Six Supreme Court Candidates in the Texas 1992 General Elections (San Antonio: The Texas Public Policy Foundation, January 1991). Another study, Political Contributions to the Supreme Court of Texas - An Appearance of Impropriety (September 2, 1992), states that "lawyers contributed 56% of all money raised by the successful Supreme Court Candidates in the 1988-1990 cycles." Particularly egregious connections between campaign contributions and judicial decisions caused television's 60 Minutes to ask: "Is Justice for Sale [in Texas]?." Texas' largest newspaper summed up the current state of affairs last year:

> There is virtual unanimity in the legal community and among the informed public that our current system of judicial campaign finance is broke. The national image of Texas

> as a state where "Justice is for sale" is fostered by continuing to sanction a system in which judges are forced to have their hands out --- usually to attorneys practicing in their court --- almost without cessation.

Judges and Dollars, Houston Chronicle, Nov. 7, 1993, Outlook Section, p.2. A former Texas Bar President has written that, "the problems [of judges raising funds from attorneys who practice before them] in Texas, unfortunately, are more severe then in other states." Charles Smith, *Judicial Fund Raising Rules Need to Be Changed*, Texas Lawyer, Jan. 27, 1992 at 10. See also Hon. Thomas Phillips, *Party, Money Shouldn't Decide Judicial Races*, Houston Chronicle, March 4, 1993 at A19 (current chief justice); Melanie Harrell, *Rid Harris County Family Courts of Cronyism*, Houston Chronicle, Jan. 27, 1994 at A21 (former chief justice calls Texas judicial system "the laughingstock of the nation.").

At least part of the reason for this deplorable state of affairs has been the inability (or unwillingness) of the Texas judiciary to resolve the propriety of these practices under state or federal law. As recently as last year a three judge intermediate appellate court in Texas split three ways in assessing the consequences of an attorney's contributions to a judge before whom he practiced. *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex. App. -- El Paso [8th Dist.] 1993, writ denied) (one judge finding no amount of contributions would impair impartiality, one judge finding that contributions could impair impartiality but that the amount at issue did not, and one judge finding that the amount at issue did impair impartiality). The Texas Supreme Court has never directly addressed the issue, *Aguilar*, 855 S.W.2d at 810 (Barajas, J. concurring and dissenting), and as noted, decided not to review even the severe split in *Aguilar*. *Cf. Sun Exploration*

v. Jackson, 783 S.W.2d 202 (Tex. 1988) (discussing the effect of relations between attorney and judge on impartiality).

Indeed, it is not to be expected that Texas judges, who after all are products of such a system, will correctly resolve the issues raised by these now widespread practices. And counsel whose livelihood depends on appearance before these elected judges will be loathe to admit, and certainly hesitant to challenge, the impartiality caused by such practices -- after all, they too must participate in those practices to try to keep the courthouse "playing field" level.

It is therefore incumbent that the Court take the opportunity presented by this case to resolve the due process issues inherent in any practice that permits parties or counsel to pay money to state judges before whom they appear.

SUMMARY

In Texas, the ever-growing custom permitting attorneys to contribute to the campaigns of judges before whom they appear is undermining not only the judicial impartiality to which individúals are entitled under the Due Proce , Clause but also the basic respect citizens have for their state judiciary. The Texas Justice Foundation asks this Court to grant petitioner's writ and resolve the issue whether or to what extent a judge may preside over cases handled by an attorney who makes financial contributions to the judge.

September 2, 1994

Respectfully submitted,

Robert D. Daniel
Michael Weiss
Daniel & Lezar
700 Louisiana Suite 3950
Houston, Texas 77002

Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

No. 94-196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,

Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR THE PETITIONER

OF COUNSEL:

DONALD F. PIERCE
H. WILLIAM WASDEN
PIERCE, CARR & ALFORD, P.C.
Suite 900
1110 Montlimar Drive
Mobile, Alabama 36609
(205) 344-5151

* THEODORE B. OLSON
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
* *Counsel of Record*

BEST AVAILABLE COPY

14 pp

TABLE OF CONTENTS

Page

I. THE FEDERAL QUESTION WAS PROPERLY PRESENTED BELOW 1

II. THE QUESTION PRESENTED IS WORTHY OF THIS COURT'S REVIEW 3

A. The Decision Below Conflicts With The Decisions of Other Federal and State Appellate Courts 4

B. The Record In This Case Contains All Of The Factual Information Necessary To Permit Plenary Consideration Of The Question Presented 5

C. The Decision Below Conflicts With Numerous Decisions Of This Court 7

D. The Question Presented Is Important 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: **Page(s)**

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 7

Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 2

Brown v. Brown, 397 S.E.2d 545 (Va. App. 1990) 4

Bryant v. Zimmerman, 278 U.S. 63 (1928) 2

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 7

In re Disqualification of Fiftieth District Court Judge, 483 N.W.2d 676 (Mich. App. 1992) 5

In re Murchison, 349 U.S. 133 (1955)..... 2,5,6

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 7

Lutz v. National Crane Corp., No. 92-445, 1994 WL 476679 (Mont. Sept. 1, 1994)..... 8

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 7

Offutt v. United States, 348 U.S. 11 (1954)..... 2,4,5,6

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) 4,5

Rice v. Sioux City Mem. Park Cemetery, Inc., 349 U.S. 70 (1955) 3,4

Taylor v. Kentucky, 436 U.S. 478 (1978)..... 2

Tumey v. Ohio, 273 U.S. 510 (1927) 7,8

Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 7

Table of Authorities (Continued)

Page(s)

Constitution, Statutes and Rules

Due Process Clause, U.S. Const., amend. XIV, § 1 2,9

28 U.S.C. § 455(a) 5

Sup. Ct. R. 10.1(b) 4

Sup. Ct. R. 10.1(c) 3

Other Authorities

America's Third Political Party: A Study of Political Contributions by the Plaintiff's Lawyer Industry (ATRA 1994) 9

N. Roman, *Verdict on Political Giving: Spending in State Elections Dominated by Trial Lawyers*, Wash. Times, Sept. 13, 1994 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-196

GROVE NORTH AMERICA, DIVISION OF KIDDE INDUSTRIES, INC., a corporation,
Petitioner,

v.

RICHARD DOUGLAS LOWE and HONORABLE ROGER MONROE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR THE PETITIONER

Petitioner Grove North America, Division of Kidde Industries, Inc., a corporation ("Grove"), respectfully submits this reply brief in support of its petition for a writ of certiorari in this case.

I. THE FEDERAL QUESTION WAS PROPERLY PRESENTED BELOW

Respondent Richard Douglas Lowe errs in contending (Br. in Opp. 5-9) that the federal question was not properly presented to the courts below. As Grove demonstrates in its petition (Pet. 4-6), Grove expressly relied on federal due

process principles and cases in both the state trial court and the state supreme court, and that reliance was sufficient to preserve the due process issue for review.

To be sure, Grove did not include an express reference to "the Due Process Clause of the Fourteenth Amendment" in all of its pleadings below, but this Court's precedents do not impose such a hypertechnical requirement on parties seeking to preserve federal questions for review. To the contrary, it is well settled that a federal constitutional claim can be preserved even without express reference to the relevant constitutional provision. Thus, for example, in *Bryant v. Zimmerman*, 278 U.S. 63 (1928), the Court held that a Fourteenth Amendment claim had been properly preserved in state court even though the appellant's trial court papers "contained no mention of any constitutional provision, state or federal." *Id.* at 67.

Similarly, in *Braniff Airways v. Nebraska St. Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954), the Court concluded that a federal due process claim had been properly presented even though the appellant had not relied upon the Due Process Clause at all, instead citing (erroneously) the Commerce Clause in support of its argument that certain property was not taxable. The Court explained that, "[t]hough inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 599. By the same token, because Grove argued in both courts below that "disqualification is rightly required" under the due process principles enunciated in *In re Murchison*, 349 U.S. 133 (1955), *Offutt v. United States*, 348 U.S. 11 (1954), and their progeny (*see* Pet. 4-5), there can be no question that "the due process issue [is] within the clear intendment of such contention."

Taylor v. Kentucky, 436 U.S. 478 (1978), likewise compels rejection of respondent's contention that Grove failed to preserve its due process claim. In *Taylor* the petitioner objected to an instruction on the ground that it violated "fun-

damental principle[s] of judicial fair play," without expressly referring to the Fourteenth Amendment or citing federal due process cases to support or explain the nature of that assertion. *Id.* at 482 n.10. This Court nonetheless concluded that it had jurisdiction to consider the petitioner's due process challenge, because the petitioner's objection "should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Id.* *A fortiori*, Grove's actual *citation* of federal due process cases, together with its express and repeated reliance on (and quotation of) the due process principles announced in those cases, more than sufficed to preserve the federal question for this Court's review. Respondent's contention to the contrary is entirely without merit.

II. THE QUESTION PRESENTED IS WORTHY OF THIS COURT'S REVIEW

Respondent concedes that "[q]uestions regarding . . . the financing of judicial elections are important" (Br. in Opp. 9), but nonetheless asserts that review is not warranted in this case because, in his view, there is no conflict among lower court decisions and the record is incomplete.[1] Those assertions are incorrect.

---

[1] Respondent also contends (Br. in Opp. 9) that review should be denied because the question presented is not "substantial," citing *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). *Rice* construed this Court's former Rule 19, which authorized review by certiorari "'[w]here a state court has decided a federal question *of substance*.'" 349 U.S. at 74 (emphasis added). The italicized language, however, no longer appears in this Court's Rules, which indicate instead that review is appropriate where "a state court . . . has decided an *important* question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c) (emphasis added). As even respondent concedes (Br. in Opp. 9), the question at issue in this case is unquestionably "important."

In any event, even the analysis of the Court in *Rice* supports issuance of a writ of certiorari here. In that case, the Court dismissed the writ as improvidently granted upon learning that a newly adopted

[Footnote continued on following page]

A. The Decision Below Conflicts With The Decisions Of Other Federal And State Appellate Courts

1. Respondent contends (Br. in Opp. 10) that *Brown v. Brown*, 397 S.E.2d 545 (Va. App. 1990), does not conflict with the decision below because *Brown* involved a contribution for a *non*-judicial political race, whereas in this case the contribution was for a judicial election. What respondent fails to explain, however, is why the nature of the election for which the contribution is made has any meaningful bearing on the legal question at issue here. The *Brown* court squarely held that a $400 contribution to a state court commissioner's political campaign from a lawyer with a case pending before the commissioner created "a strong suspicion of improper influence" and violated the rule "that 'justice must satisfy the appearance of justice.'" 397 S.E.2d at 547 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). That reasoning is fully applicable to contributions for judicial races as well, because the impropriety arises from the identity of the contributor and recipient and the timing of the contribution, not from the type of campaign in which the contribution will ultimately be used. *Brown*'s rationale is simply irreconcilable with the result below, and certiorari is warranted to resolve that conflict. Sup. Ct. R. 10.1(b).

2. Respondent also errs in contending (Br. in Opp. 11-12) that there is no division of authority on the propriety of joint financial interests between a judge and counsel for a party to a case pending before the judge. As explained in Grove's petition (Pet. 12-13), *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820

[Footnote continued from previous page]

state statute "bars the ultimate question presented in this case from again arising." 349 U.S. at 73. The issues involved in this case, by contrast, have arisen (and will continue to arise) with increasing frequency in numerous jurisdictions, and thus they are plainly "substantial" under the test enunciated in *Rice*. *See* Pet. 16-17; *infra* pp. 8-9.

(1980), mandated disqualification of a trial judge in a closely analogous factual setting, holding that the judge's financial relationship with counsel created an appearance of partiality requiring disqualification under 28 U.S.C. § 455(a). Although not a due process case, *Potashnick* is controlling in this context as well, because the Due Process Clause—like Section 455(a)—requires the courts to achieve the "appearance of justice." *Offutt*, 348 U.S. at 14; *In re Murchison*, 349 U.S. at 136.

Respondent's attempt (Br. in Opp. 11) to distinguish *In re Disqualification of Fiftieth District Court Judge*, 483 N.W.2d 676 (Mich. App. 1992), is similarly misplaced. In that case, just as here, the trial judge and the attorney for a party to a pending case had a joint financial interest, and the judge received financial benefits from the attorney that were attributable to that joint interest. That the asset involved in *Fiftieth District Court Judge* was real estate rather than the right to attorney's fees in pending cases is obviously of no consequence. In short, the decision below is inconsistent with both *Potashnick* and *Fiftieth District Court Judge*, and review is warranted to resolve the conflict.[2]

B. The Record In This Case Contains All Of The Factual Information Necessary To Permit Plenary Consideration Of The Question Presented

1. Respondent asserts (Br. in Opp. 10-11) that the record is inadequate to permit review of the question whether a state judge may continue to preside over a case after accepting substantial monetary contributions from counsel for a party to that case. According to respondent, that question cannot be resolved without consideration of such issues as "judicial races in Alabama, total and average amounts spent,

---

[2] In addition to the cases discussed in text, Grove's petition cites several other cases requiring disqualification in analogous circumstances. Pet. 13 n.9. Respondent makes no effort to distinguish those cases, effectively conceding that they cannot be reconciled with the decision below.

where specific judges' contributions come from, etc." Br. in Opp. 11.

Respondent's contention is frivolous. Grove does not seek to invalidate the entire Alabama system of judicial elections, nor does it seek review of the conduct of any Alabama judges other than the trial judge in this case. Rather, Grove's claim is that a judge's acceptance of a substantial political contribution from counsel for a party to a case pending before the judge creates such an appearance of bias that disqualification is required. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The factual issues cited by respondent are irrelevant to that claim, and the only facts that *are* relevant—the amount and timing of respondent's counsel's contribution to the trial judge, and the latter's acceptance of that contribution during the pendency of this case—are *conceded* by respondent. *See* Br. in Opp. 1 (conceding the accuracy of the facts set forth in Grove's petition); Pet. 3-4 (stating that the law firm representing respondent contributed $5,000 to the state trial judge while this case was pending before him). Thus, the factual record is complete.

2. Respondent also claims (Br. in Opp. 11) that there is "a too-slim record" in this case to permit review of the question whether trial judges may continue to preside over cases after receiving substantial monetary payments in the form of referral fees from counsel to a party. Respondent does not dispute that the law firm representing him paid the trial judge nearly $24,000 in "referral fees" during the pendency of this case, however, so there is no basis for contending that the record on this issue is incomplete. It is of no relevance whether the trial judge "might have had 90 files in his office" and "may have referred three cases each to 30 separate law firms" (Br. in Opp. 11) at the time of his election to the state bench; the improper appearance of bias in this case was created by the trial judge's financial relationship with, and acceptance of large cash payments from, respondent's counsel during the pendency of this case, not

by whatever payments the judge may have received from *other* lawyers with respect to other cases. In short, the record contains all of the factual information required.

C. The Decision Below Conflicts With Numerous Decisions Of This Court

While making no effort to demonstrate that the trial judge's conduct in this case meets the standards set forth in most of the cases cited by Grove (*see* Pet. 8-9, citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); and *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), respondent attempts to distinguish *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), by pointing to trivial factual differences between that case and this one. Br. in Opp. 12. What respondent's argument entirely ignores, however, is the *reasoning* of the *Continental Casualty* Court, which required disqualification because of the "close financial relations that had existed between" the arbitrator and one of the parties, not because of the inconsequential facts cited by respondent. *Id.* at 148; *see also id.* at 150 (White, J., concurring) (undisclosed "business relationship" with a party requires disqualification unless "the relationship is trivial"). That reasoning plainly requires disqualification in the circumstances of this case.

Nor is respondent correct in asserting (Br. in Opp. 12) that *Continental Casualty* can be distinguished because it cited (as "not controlling in this case") the Rules of the American Arbitration Association and the Canons of Judicial Ethics. 393 U.S. at 149. Respondent simply ignores the crucial passage in the Court's opinion which makes clear that, as a matter of due process, "if a litigant could show that a . . . judge in a court of justice had, unknown to the litigant, any such [close financial] relationship, the judgment would be subject to challenge." 393 U.S. at 148 (cit-

ing *Tumey v. Ohio*). The longstanding and substantial financial relationship between respondent's counsel and the trial judge in this case is at least as "close" as that at issue in *Continental Casualty*, and thus disqualification is required as a matter of due process.

D. The Question Presented Is Important

As Grove explained in its petition (Pet. 16-17), the question presented in this case involves important issues under the Due Process Clause that have not been, but should be, addressed by this Court. Recent developments serve only to bolster Grove's contention in this regard.

First, the Montana Supreme Court recently addressed a disqualification claim based on a judge's referral-fee relationship with an attorney representing a party in a case pending before the judge. *See Lutz v. National Crane Corp.*, No. 92-445, 1994 WL 476679, at *11-*12 (Mont. Sept. 1, 1994). Although the *Lutz* opinion does not state that the trial judge actually received any payment from the attorney, the case is otherwise analogous to this one, and demonstrates convincingly that the referral-fee issue is arising with increasing frequency in the state courts.[3]

Second, as shown by the *amicus curiae* brief of the Texas Justice Foundation in this case, the appearance problems created by substantial political contributions from judges to lawyers are not limited to Alabama. Over an 18-month period in 1991 and 1992, for example, plaintiffs' personal injury lawyers alone contributed nearly $1.5 million to candidates for the Texas Supreme Court, yet the Texas courts and legislature have made no effort to address the obvious due process concerns raised by such massive contributions

[3] The *Lutz* court rejected the disqualification claim, but largely for reasons unrelated to the strength of Grove's claim in this case. Moreover, *Lutz* did not involve the additional factor of substantial campaign contributions from the party's attorney to the judge, and thus the overall appearance of partiality created in this case is considerably more substantial than it was in *Lutz*.

from lawyers who practice in front of the recipients of their largesse.[4]

The issues raised by this petition reflect deep-seated flaws in the judicial systems of numerous States, flaws that strike at the heart of the Due Process Clause's guaranty of a fair tribunal. State courts in Alabama, Texas, Montana, and other States have now made clear that they will not enforce that guaranty in circumstances similar to this case. In view of the importance of these issues, the frequency with which they continue to arise, and the inability of the lower courts to resolve them in a satisfactory and consistent manner, this Court should grant certiorari in order to preserve and implement the values reflected in the Due Process Clause.

---

[4] A recent study by the American Tort Reform Association ("ATRA") further demonstrates the massive and distorting influence of political contributions from plaintiffs' attorneys in Alabama. That study reveals, *inter alia*, that Alabama plaintiffs' attorneys contributed over $5 million to political candidates, including judges, between 1990 and 1994, with the 15 largest attorney-contributors giving an average of almost $150,000. *See* N. Roman, *Verdict on Political Giving: Spending in State Elections Dominated by Trial Lawyers*, Wash. Times, Sept. 13, 1994, at A10; *America's Third Political Party: A Study of Political Contributions by the Plaintiff's Lawyer Industry* 10 (ATRA 1994). More than 25 percent of the Alabama total—some $1.3 million—represents contributions to candidates for, or justices of, the Supreme Court of Alabama alone. *Id.* at 7. Significantly, the Hare, Wynn, Newell & Newton firm, which represents respondent in this case, was the fourth largest contributor among Alabama plaintiffs' firms, with firm attorneys giving a total of $262,375 to political candidates between 1990 and June 30, 1994. *Id.* at 12, 21.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 16, 1994 Respectfully submitted.

OF COUNSEL:

DONALD F. PIERCE
H. WILLIAM WASDEN
PIERCE, CARR & ALFORD, P.C.
Suite 900
1110 Montlimar Drive
Mobile, Alabama 36609
(205) 344-5151

* THEODORE B. OLSON
LARRY L. SIMMS
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner
* *Counsel of Record*